

Volume 63 | Issue 1

---

2012

## Volume 63 Issue 1 (2010)

Case Western Reserve University Law Review

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

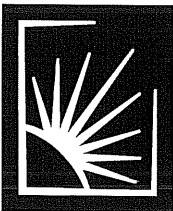
### Recommended Citation

Case Western Reserve University Law Review, *Volume 63 Issue 1 (2010)*, 63(1) Case W. Res. L. Rev. Front Matter (2012)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol63/iss1/2>

This Front Matter is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# Case Western Reserve Law Review

Volume 63, Issue 1  
Fall 2012



SCHOOL OF LAW

---

CASE WESTERN RESERVE  
UNIVERSITY

© 2012 by Case Western Reserve Law Review

The Case Western Reserve Law Review (ISSN 0008-7262), formerly the Western Reserve Law Review, is published quarterly by the students of Case Western Reserve University School of Law. Postage paid at Cleveland, Ohio and at additional mailing offices. Editorial and business offices are located at Case Western Reserve University School of Law, 11075 East Boulevard, Cleveland, Ohio 44106. Contact the Review by e-mail: [lawreview@case.edu](mailto:lawreview@case.edu) or telephone: (216) 368-3312.

The Case Western Reserve Law Review published this issue in print and online in November 2012.

The submission of unsolicited manuscripts is invited.

Subscriptions are entered for the entire volume for \$32.00 per year (\$34.00 outside the United States). Single issues of the current and previous volumes are available from the Case Western Reserve Law Review for \$16.00 each, plus shipping and handling.

Back issues from earlier volumes are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209, or online: [www.wshein.com/catalog/101440](http://www.wshein.com/catalog/101440). Back issues are also available in electronic format at [heinonline.org](http://heinonline.org).

Citations conform to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Style conforms generally to *The Chicago Manual of Style* (16th ed. 2010).

For all photocopy or republication requests, please contact Copyright Clearance Center, Inc. by mail: 222 Rosewood Drive, Danvers, Massachusetts 01923, by phone: (855) 239-3415, by fax: (978) 646-8600, by e-mail: [info@copyright.com](mailto:info@copyright.com), or online: [www.copyright.com](http://www.copyright.com).

# CASE WESTERN RESERVE LAW REVIEW

---

Volume 63

Fall 2012

Issue 1

---

*Editor in Chief*

BENJAMIN L. RISTAU

*Managing Editor*

DANIEL T. PESCIOTTA

*Publisher*

ROBERT D. CHEREN

*Executive Articles Editor*

JOSH FRIEDMAN

*Executive Contributing Editor*

HOPE LU

*Executive Notes Editor*

GREGORY SCHOLAND

*Executive Symposium Editor*

PAUL JANOWICZ

*Associate Coordinator*

LAURA BERTRAM

*Executive Production Editor*

NELSON LEESE

SARA CORRADI

*Contributing Editors*

ISAAC FIGUERAS

VERONICA LAMBILLOTTE

*Senior Editors*

ANDREW CLARK

DANIEL FALK

EPHRAIM FOLBERG

DAVID FRANTZ

DUSTIN GODENSWAGER

ANDREW GURAN

ANTHONY MARTUCCI

EMILY MYERS

KYLE MYSKA

LESLIE SHAFER

AURELIA TUNRU

DANIEL VERKHLIN

*Associate Editors*

HUNTER BENSON

KENNAN CASTEL-FODOR

GABRIELLE DiBELLA

GREGORY FROHMAN

YELENA GRINBERG

KATIE HALL

PATRICK HANEY

ELIZABETH HORAN

MICHAEL IANNITTI

ERIK LANGE

ANDREA LATESSA

JOSHUAH LISK

JANELLE M. MAHOWALD

MARK NORRIS

JOHN ROONEY

CORBIN SANTO

KATHERINE SHAW

CHELSEA SHENTON

SAMUEL TOTH

MADELINE VAN GUNTEN

STEPHANIE M. WILLIAMS

*Faculty Advisor*

JONATHAN L. ENTIN

CASE WESTERN RESERVE UNIVERSITY  
SCHOOL OF LAW FACULTY

*Administrative Officers*

*Dean*

LAWRENCE E. MITCHELL, B.A., J.D.

*Associate Dean for Academic Affairs*

JONATHAN L. ENTIN, A.B., J.D.

*Associate Dean for Faculty Development and Research*

B. JESSIE HILL, B.A., J.D.

*Associate Dean of Experiential Education*

KENNETH R. MARGOLIS, B.A., J.D.

*Associate Dean for Global Legal Studies*

MICHAEL P. SCHARF, A.B., J.D.

*Associate Dean for Enrollment Planning and Strategic Initiatives*

ALYSON S. ALBER, B.S., J.D.

*Associate Dean for Student Services*

SARAH MCFARLANE POLLY, B.A., J.D.

*Associate Dean for Development and Public Affairs*

JT GARABRANT., B.S., C.F.R.E.

*Assistant Dean of Admissions*

KELLI C. CURTIS, B.A., J.D.

*Assistant Dean of Career Development*

DONNA M. DAVIS, B.A., J.D.

*Assistant Dean for Finance and Administration and  
Chief Financial Officer*

CRYSTAL D. TAYLOR, B.S., M.B.A.

# CASE WESTERN RESERVE LAW REVIEW

Volume 63

Fall 2012

Issue 1

## TRIBUTE

- Tribute to Professor Bill Leatherberry 1  
*Louis Stokes*
- Tribute to Wilbur C. Leatherberry 3  
*Karen Nelson Moore*
- Wilbur C. Leatherberry: A CWRU Lifer 5  
*Jonathan L. Entin*
- Wilbur Leatherberry: Our Center of Gravity 9  
*Peter M. Gerhart*
- Tribute to Bill Leatherberry 11  
*Spencer Neth*

## ARTICLES

- To Defer or Not to Defer? Deference and Its Differential Impact on First Amendment Rights in the Roberts Court 13  
*Clay Calvert & Justin B. Hayes*
- The Unbearable Lightness of Consent in Contract Law 57  
*Chunlin Leonhard*
- How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act 91  
*Jodi Wilson*

## ESSAY

- The Original Plain Meaning of the Right to Bear Arms 141  
*Peter D. Junger*

## NOTES

- Apportionment: Shining the Light of Day on Patent Damages 147  
*Josh Friedman*
- I'm Not Dead Yet: *Katz*, *Jones*, and the Fourth Amendment in the 21st Century 187  
*Daniel T. Pesciotta*

## COMMENT

- Addressing the Hybrid-Rights Exception: How the Colorable-Plus Approach Can Revive the Free Exercise Clause 257  
*Hope Lu*

JULIET P. KOSTRITSKY, A.B., J.D.

*Everett S. and Eugenia D. McCurdy Professor*

RAYMOND SHIH RAY KU, A.B., J.D.

*Co-Director, Center for Law, Technology, and the Arts*

JUDITH P. LIPTON, B.S., M.S.S.W., J.D.

*Co-Director, Milton A. Kramer Law Clinic Center*

KENNETH R. MARGOLIS, B.A., J.D.

KEVIN C. McMUNIGAL, B.A., J.D.

*Judge Ben C. Green Professor*

LAURA E. McNALLY, B.A., J.D.

MAXWELL J. MEHLMAN, B.A., J.D.

*Arthur E. Petersilge Professor; Professor of Bioethics; and  
Director, Law-Medicine Center*

KATHRYN S. MERCER, A.B., M.S.S.W., J.D., PH.D.

LAWRENCE E. MITCHELL, B.A., J.D.

*Joseph C. Hostetler-Baker & Hostetler Professor*

DALE A. NANCE, B.A., M.A., J.D.

*John Homer Kapp Professor*

CRAIG ALLEN NARD, B.A., J.D., LL.M., J.S.D.

*Tom J.E. & Bette Lou Walker Professor of Law and  
Co-Director, Center for Law, Technology, and the Arts*

MATTHEW J. ROSSMAN, B.A., J.D.

*Co-Director, Milton A. Kramer Law Clinic Center*

MICHAEL P. SCHARF, A.B., J.D.

*John Deaver Drinko-Baker & Hostetler Professor;  
Director, Frederick K. Cox International Law Center; and  
Director, Henry T. King, Jr. War Crimes Research Office*

CAROLYN K. SEYMOUR, B.A., J.D.

CALVIN WILLIAM SHARPE, B.A., M.A., J.D.

*Galen J. Roush Professor*

BARBARA R. SNYDER, B.A., J.D.

*President of the University*

THEODORE L. STEINBERG, B.A., PH.D.

*Adeline Barry Davee Distinguished Professor of History and  
Professor of Law*

ROBERT N. STRASSFELD, B.A., M.A., J.D.

MARTHA A. WOODMANSEE, B.A., M.A., PH.D.

*Professor of English and Law*

RUQAIYAH A. YEARBY, B.S., M.P.H., J.D.

### *Associate Professors of Law*

KATHLEEN M. CARRICK, B.A., M.L.S., J.D.  
*Director, Law Library*

BRIAN K. GRAN, B.A., J.D., PH.D.  
*Associate Professor of Sociology and Law*

DANIEL A. JAFFE, B.A., J.D.

KENNETH F. LEDFORD, B.A., J.D., M.A., PH.D.  
*Associate Professor of History and Law*

CASSANDRA BURKE ROBERTSON, B.A., M.A., M.P. AFF., J.D.

### *Assistant Professors of Law*

AVIDAN Y. COVER, B.A., J.D.  
*Associate Director, Institute for Global Security Law and Policy*

CHARLES R. KORSMO, S.B., J.D.

ANDREW S. POLLIS, A.B., J.D.

TIMOTHY WEBSTER, B.A., M.A., J.D., LL.M.

### *Senior Instructors in Law*

MICHAEL J. BENZA, B.A., M.A., J.D.

JAIME BOUVIER, B.A., J.D.

CAROL T. FOX, B.A., M.A., PH.D., J.D.

YURI R. LINETSKY, B.A., J.D.

### *Visiting Faculty*

JON GROETZINGER, JR., A.B., J.D.  
*Director, China Law Program*

AYESHA B. HARDAWAY, B.A., J.D.

DAVID R. KOCAN, B.S., J.D.

JEAN M. MCQUILLAN, B.A., J.D.

CARMEN NASO, B.A., J.D.

DAVID P. PORTER, B.S., J.D.

DALINDYBOE B. SHABALALA, B.A., J.D.

BERNARD S. SHARFMAN, B.S., M.B.A., M.A., M.S., J.D.

LISA M. WOOD, B.A., J.D.



*Professors Emeriti*

ARTHUR D. AUSTIN II, B.A., J.D.  
*Edgar A. Hahn Professor Emeritus*

RONALD J. COFFEY, A.B., LL.B., LL.M.

MELVYN R. DURCHSLAG, B.S., J.D.

ROBERT P. LAWRY, B.A., J.D., DIP. LAW  
*Director, Center for Professional Ethics*

WILBUR C. LEATHERBERRY, A.B., J.D.

JAMES W. MCELHANEY, A.B., LL.B.  
*Joseph C. Hostetler Professor Emeritus of Trial Practice and Advocacy*

LOUISE W. MCKINNEY, B.A., J.D.

EDWARD A. MEARNs, JR., B.A., J.D.

SPENCER NETH, B.A., J.D., LL.M.

SIDNEY I. PICKER, JR., A.B., LL.B., LL.M.

MORRIS G. SHANKER, B.S.E.E., M.B.A., J.D.  
*John Homer Kapp Professor Emeritus*

## *Professors of Law*

JONATHAN H. ADLER, B.A., J.D.  
*Johann Verheij Professor and  
Director, Center for Business Law and Regulation*

JESSICA WILEN BERG, B.A., J.D., M.P.H.  
*Professor of Law, Bioethics, and Public Health and  
Associate Director, Law-Medicine Center*

DAVID J. CARNEY, B.A., J.D.

JUSCELINO F. COLARES, LL.B., M.A., PH.D., J.D.  
*Associate Director, Frederick K. Cox International Law Center*

JENNIFER I. CUPAR, B.S., J.D.

GEORGE W. DENT, JR., B.A., J.D., LL.M.

JONATHAN L. ENTIN, A.B., J.D.  
*David L. Brennan Professor and Professor of Political Science*

SCOTT FINE, B.A., M.B.A.  
*Professor for the Practice of Banking and Finance and Law*

SHANNON E. FRENCH, B.A., PH.D.  
*Inamori Professor of Ethics;  
Professor of Law; and  
Director, Inamori International Center for Ethics and Excellence*

LEON GABINET, PH.B., J.D.  
*Coleman P. Burke Professor*

PETER M. GERHART, B.A., J.D.

PAUL C. GIANNELLI, B.A., M.S.F.S., J.D., LL.M.  
*Distinguished University Professor and  
Albert J. Weatherhead III and Richard W. Weatherhead Professor*

JONATHAN C. GORDON, B.A., J.D.

RICHARD K. GORDON, B.A., J.D.  
*Director, Institute for Global Security Law and Policy and  
Associate Director, Frederick K. Cox International Law Center*

B. JESSIE HILL, B.A., J.D.  
*Associate Director, Center for Social Justice*

SHARONA HOFFMAN, B.A., J.D., LL.M.  
*Edgar A. Hahn Professor, Professor of Bioethics, and  
Co-Director, Law-Medicine Center*

ERIK M. JENSEN, S.B., M.A., J.D.  
*Schott-van den Eynden Professor*

LEWIS R. KATZ, A.B., J.D.  
*John C. Hutchins Professor and  
Director, Graduate Program for Foreign Students in U.S. & Global Legal Studies*

MAUREEN SHERIDAN KENNY, B.A., J.D.

# CASE WESTERN RESERVE LAW REVIEW

---

Volume 63

Fall 2012

Issue 1

---

## TRIBUTE

- Tribute to Professor Bill Leatherberry 1  
*Louis Stokes*
- Tribute to Wilbur C. Leatherberry 3  
*Karen Nelson Moore*
- Wilbur C. Leatherberry: A CWRU Lifer 5  
*Jonathan L. Entin*
- Wilbur Leatherberry: Our Center of Gravity 9  
*Peter M. Gerhart*
- Tribute to Bill Leatherberry 11  
*Spencer Neth*

## ARTICLES

- To Defer or Not to Defer? Deference and Its Differential  
Impact on First Amendment Rights in the Roberts Court 13  
*Clay Calvert & Justin B. Hayes*
- The Unbearable Lightness of Consent in Contract Law 57  
*Chunlin Leonhard*
- How the Supreme Court Thwarted the Purpose  
of the Federal Arbitration Act 91  
*Jodi Wilson*

## ESSAY

- The Original Plain Meaning of the Right to Bear Arms 141  
*Peter D. Junger*

## NOTES

- Apportionment: Shining the Light of Day on Patent Damages 147  
*Josh Friedman*
- I'm Not Dead Yet: *Katz*, *Jones*, and the 187  
Fourth Amendment in the 21st Century  
*Daniel T. Pesciotta*

## COMMENT

- Addressing the Hybrid-Rights Exception: How the Colorable-Plus 257  
Approach Can Revive the Free Exercise Clause  
*Hope Lu*

## EDITOR'S NOTE

As you flip, or more likely scroll, through the pages of this issue, you will notice that the Case Western Reserve Law Review has a new look. The Review has changed its design many times—the cover alone eight times since 1968—but there had been no significant update for the past eighteen years. Yet, over those same years, the way law reviews are distributed and read changed tremendously. With that in mind, the Volume 63 Executive Board set out to refresh the Review and make it better adapted to a digital world.

The new design incorporates aesthetic elements, but the primary goal was functional: to make the journal easier to read both in print and on screens. A few highlights of the design are

- a new typeface, designed by renowned computer scientist Donald Knuth, a 1960 graduate of Case Institute of Technology;
- the addition of more letter spacing to the footnote text to make it more legible; and
- improved running headers, which now display all important navigational information on one page.

These are but a few of the many changes. A comprehensive list of modifications can be found on our website at <http://law.case.edu/journals/lawreview/>. We welcome feedback. Please write to us at [lawreview@case.edu](mailto:lawreview@case.edu).

Finally, we must thank and acknowledge our intrepid publisher, Robert Cheren, whose vision and dedication made this project possible.

*Benjamin Ristau*  
Editor in Chief  
Volume 63